84-957

Office - Supreme Court, U.S.
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ALEXANDER L. STEVAS,
CLERK

No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

MICHAEL COLLINS,

Petitioner,

vs.

THE UNIVERSITY OF CINCINNATI
and RAYMOND WALTERS COLLEGE,

Respondent

vs.

THE CITY OF CINCINNATI,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF OHIO

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68

QUESTIONS PRESENTED FOR REVIEW

1. When a student in a career program of a state-affiliated municipal university is dismissed from the program by the faculty for allegedly academic reasons, and the university's grievance committee determines that such dismissal was wrongful recommending the student be reevaluated, is it a violation of the student's constitutional right to procedural and substantive due process justifying judicial intervention that the student is administered a new final exam under different circumstances and graded differently and on a different curve than the exams of other students in that class; that after failing the new exam the student is denied the opportunity to make-up the exam or to repeat the course the following year while other students in the program

were given such opportunities; that the reevaluation is conducted by the same faculty that wrongfully dismissed the student previously at a meeting of which the student gets no notice; and that as a result of the reevaluation, the student is dismissed again with a letter from the program director kept in the student's permanent academic file stigmatizing such student as dangerous and lacking integrity?

2. When the plaintiff presents several affidavits, depositions and exhibits in response to defendant's motion for summary judgment which raise a genuine issue of material fact as to whether the defendant-university acted arbitrarily, capriciously or in bad faith in dismissing plaintiff-student, does the trial court violate plaintiff's right to due process by

granting summary judgment on the ground of judicial nonintervention into academic affairs?

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OPINIONS BELOW

The Supreme Court of Ohio issued no opinion in denying Petitioner's motion to certify the record from the Court of Appeals. The order of the Supreme Court of Ohio overruling said motion is included herein at Appendix A.

The memorandum decision and judgment entry of the First District Court of Appeals for the State of Ohio affirming the trial court decision is included herein at Appendix B and does not appear in any reporter.

The Entry Granting Summary Judgment and the Memorandum of Decision of the Court of Common Pleas, Hamilton County, Ohio, is included herein at Appendix C and does not appear in any reporter.

JURISDICTION

The judgment of the Supreme Court

of Ohio was entered September 19, 1984. This Court's jurisdiction is invoked under 28 U.S.C. Section 1257(3).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

1. The Fourteenth Amendment of the Constitution of the United States, Section 1.:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. Rule 56 of the Ohio Rules of Civil Procedure is included herein at Appendix D.

STATEMENT OF THE CASE

In 1975 Petitioner transferred into the second year of an associate degree program known as Hospital Pharmacy Technology at the Raymond Walters College of the Respondent University of Cincinnati. He transferred from the College of Pharmacy of Respondent with advanced standing scheduled to graduate in March, 1976. At that time Respondent was a state-affiliated municipal university as defined under the statutes of Ohio.

After the summer quarter Petitioner had a dispute over grades with the associate director of the program who also taught two of the required courses for graduation. The dispute centered on Petitioner's claim to an "A" where he was awarded a "B". When Petitioner initiated a grievance

against the professor regarding the grades, the associate program director called a faculty meeting wherein he announced his intent to withdraw Petitioner from his two courses with a failing grade and dismiss him from the program. The other faculty members allowed that Petitioner could complete the fall quarter in their courses. The decision was not promptly communicated to Petitioner who sat for both exams in the two courses of the associate program director, but the exams were never graded and were shortly thereafter destroyed.

Petitioner initiated another grievance which was joined with the grade grievance and heard by the ad hoc committee near the end of the spring quarter. Petitioner was not

allowed to audit the spring quarter courses pending the grievance so was barred from graduating timely. The ad hoc grievance committee found that Petitioner had been wrongfully graded and withdrawn from the courses taught by the associate program director. The committee which found that Petitioner was not academically deficient recommended that Petitioner's grades for the summer quarter courses be raised, that he be offered the choice of a new exam for the two fall quarter exams which were destroyed ungraded or to return the following year to repeat the two courses, and that by the end of the spring quarter, he would be reevaluated by the program faculty to determine if he should be allowed to complete the program and graduate.

New exams were prepared by the

faculty and administered to Petitioner by the program director. Petitioner was not allowed to refer to chemistry tables during the new exams as had been allowed during the original exams taken by Petitioner and the other students in the program. When graded, the new exams were not awarded partial credit on questions where calculations were proper but the answer incorrect, even though other students were awarded partial credit on the original exams. The new exams of Petitioner were awarded Fs, but were not graded on a curve with the other students. On one original exam, a student scoring 65 percent received a B while Petitioner's 53 percent on the new exam was awarded an F.

Notwithstanding the failing grade on both new exams, Petitioner earned

a C in one course in which the final exam was averaged with his A grade in the lab portion of the course. Despite the F grade in the other course, Petitioner finished the quarter with a cumulative grade point average in the program of 2.8, ahead of six out of the sixteen other students in the program. The one failed course was identical to a course he had already passed in the College of Pharmacy earlier, but which credits were not transferred by order of the associate program director against whom Petitioner filed the grievance.

In June, 1976 the faculty of the program met, including the associate program director whom the grievance committee found to be biased. Petitioner was not notified of the meeting. The faculty voted to dismiss Petitioner from the progam despite his solid grade average and successful completion of all but one course. Two students who had failed

the first quarter final exam of the associate program director had been allowed to retake the exam until they passed. Petitioner was denied the opportunity. Two students who graduated from the program had failed courses in previous years but were allowed to repeat those courses the following year. Petitioner was denied this opportunity.

After the faculty vote, the program director wrote a letter to the dean, a copy of which is in Petitioner's permanent academic file, confirming Petitioner's dismissal and also accusing him of being dangerous and lacking integrity. These accusations had never previously been raised nor were they substantiated by anything presented to the ad hoc grievance committee or the faculty.

When Petitioner learned of his dismissal, he instituted an action in the Common Pleas Court of Hamilton County, Ohio, for breach of contract. The original complaint was dismissed on jurisdictional grounds relating to the Ohio Court of Claims and the conversion of the Respondent University from a state affiliated municipal university to a state university in 1976. On appeal, it was reversed and remanded. Upon remand, Respondent University filed a third party complaint against the City of Cincinnati and a motion for summary judgment on the ground that judicial nonintervention in academic matters prohibited court review of this case. Petitioner responded with the affidavits of several other students, an expert in pharmacy calculations and Petitioner, and depositions of the dean, the program director, the associate program

director and another professor, and numerous documents. In Petitioner's memorandum opposing summary judgment, he set forth the legal principal that court's can review academic decisions where the conduct of the university is arbitrary and capricious, the violation of substantive due process as protected under the Fourteenth Amendment of the United States Constitution.

The trial court granted the motion for summary judgment stating:

CONCLUSION

> When a student is dismissed for academic reasons a formal hearing is not required to satisfy due process. Michael Collins was afforded a formal hearing through the grievance process, which he actually participated in. Therefore, Raymond Walters did not deny Michael Collins of due process.
>
> For the past 60 years, Courts have consistently upheld

> judicial noninterference in academic affairs. Neither does this action fall under the arbitrary and capricious exception to warrant this Court to interfere in academic affairs. An exception which has been recognized primarily in dicta and rarely used (sic).
>
> Any action by this Court would constitute an unwarranted, as well as unprecedented judicial intrusion into matters of traditional educational decision making beyond the scope of judicial review. There is no genuine issue existing as to any material fact, the University of Cincinnati's motion for summary judgment pursuant to Rule 56 of the Ohio Rules of Civil Procedure is granted as a matter of law. (Memorandum of Decision of Judge Schott, Appendix C at 43)

Petitioner appealed to the First District Court of Appeals, Hamilton County, Ohio. Petitioner argued in his brief that there were numerous issues raised by Petitioner's affidavits, depositions and exhibits concerning arbitrary and capricious

action by Respondent to prevent the granting of summary judgment. In addition to the substantive due process argument, Petitioner raised the issue of a violation of procedural due process in not being able to respond and rebut the letter accusing him of being dangerous and lacking integrity. The Court of Appeals affirmed in a per curiam decision stating:

> He was afforded full procedural due process . . . . He was also afforded substantive due process, whatever standard is used to review an academic decision; that is, whether we use "clearly arbitrary and capricious" . . ., or "bad faith or malice," . . ., or "clear abuse of discretion" . . . (citations omitted, Court of Appeals Memorandum Decision, Appendix B at 35) .

Petitioner filed a motion to certify the case to the Ohio Supreme Court. In his memorandum in support of

jurisdiction, he set forth the argument of the violation of his constitutional right to due process. The Ohio Supreme Court denied the motion without opinion (Appendix A).

ARGUMENT

1. When a student in a career program of a state-affiliated municipal university is dismissed from the program by the faculty for allegedly academic reasons, and the university's grievance committee determines that such dismissal was wrongful recommending the student be reevaluated, is it a violation of the student's constitutional right to procedural and substantive due process justifying judicial intervention that the student is administered a new final exam under different circumstances and graded differently and on a different curve than the exams of other students in that class; that after failing the new exam the student is denied the opportunity to make-up the exam or to repeat the course the following year while other students in the program were given such opportunities; that the reevaluation is conducted by the same faculty that wrongfully dismissed the student previously at a meeting of which the student gets no notice; and that as a result of the reevaluation, the student is dismissed again with a letter from the program director kept

in the student's permanent academic file stigmatizing such student as dangerous and lacking integrity?

Petitioner alleges that the conduct of the Respondent University after the grievance procedure was arbitrary and capricious, discriminatory toward him, and a bad faith attempt to make a sham of the grievance procedure, thereby constituting a violation of his right to substantive due process as guaranteed under the Fourteenth Amendment. In addition, his exclusion from the final reevaluation meeting and the stigmatizing letter in his academic file which was not afforded him until litigation ensued constitute a violation of his right to procedural due process as guaranteed under the Fourteenth Amendment.

The trial court in granting summary judgment relied in large part

on the United States Supreme Court decision in Board of Curators, University of Missouri v. Horowitz, 435 U.S. 78 (1978), finding no requirements for a formal hearing in cases involving academic dismissals. The trial court felt that since Petitioner had been given a grievance hearing, he could not complain. The trial court was deaf to arguments that the grievance committee recommendations for reevaluation by the same faculty the committee found to have wrongfully dismissed Petitioner was a sham and that activities of the Respondent after the grievance procedure constituted new violation of due process. With regard to the issue of substantive due process, the trial court looked to Horowitz, supra to conclude it is a right recognized only in dicta or rarely enforced.

The trial court glossed over the substantive due process argument despite the presentation of numerous cases finding for the students on the basis of arbitrary or capricious conduct by schools with facts analagous to the case at bar. Connelly v. University of Vermont and State Agricultural College, 244 F.Supp. 156 (D.Vt. 1965); Depperman v. University of Kentucky, 371 F.Supp. 73 (ED. Ky. 1974); Shuffer v. Board of Trustees of California State University and Colleges, 67 Cal. App. 3d 208, 136 Cal. Rptr. 527 (1977); Abbariao v. Hamline University School of Law, 258 N.W.2d 108 (Minn. 1977); Maitland v. Wayne State University Medical School, 76 Mich. App. 631, 257 N.W.2d 195 (1977); Tanner v. Board of Trustees of University of Illinois, 48 Ill. App. 3d 680, 363 N.E.2d 208 (1977); Valvo

v. University of Southern California, 67 Cal. App. 3d 887, 136 Cal. Rptr. 865 (1977); DeMarco v. University of Health Sciences, 40 Ill. App. 3d 474, 352 N.E.2d 356 (1976); Wong v. Regents of University of California, 15 Cal. App. 3d 823, 93 Cal. Rptr. 502 (1971); and Schoppelrei v. Franklin University, 11 Ohio App. 2d 60, 228 N.E.2d 334 (1967). See also Crook v. Baker, 584 F.Supp. 1531 (E.D. Mich. 1984), and Dietz v. American Dental Association, 479 F.Supp. 554 (E.D. Mich. 1979). The right of a student to have court review of the arbitrary and capricious conduct of universities has been recognized even in cases ruling against the student. Mahavongsanan v. Hall, 529 F.2d 448 (5th Cir. 1976); Gaspar v. Burton, 513 F.2d 843 (10th Cir. 1975); Greenhill v. Bailey, 519

F.2d 5 (8th Cir. 1975); Stoller v. College of Medicine, 562 F.Supp. 403 (M.D. Pa. 1983) aff'd. 727 F.2d 1101; Neel v. Indiana University Board of Trustees, 435 N.E.2d 607 (Ct. App. 1982); and Patti Ann H. v. New York Medical College, 88 A.D.2d 296, 453 N.Y.S.2d 196 (1982).

The Court of Appeals below acknowledged the existence of the substantive due process right in academic dismissal cases, but was uncertain what standard was applicable. They found no violation anyway. Their confusion has been echoed by two federal circuit courts in Hines v. Rinker, 667 F.2d 669 (8th Cir. 1981), and Stevens v. Hunt, 646 F.2d 1168 (6th Cir. 1981) which both stated:

> At the time of the decision in Board of Curators v. Horowitz . . . several courts had implied, in dicta, that a university student might have a cause of action for violation of substantive due process arising out of an academic dismissal from a university . . . . The Horowitz decision leaves open whether such a cause of action exists. (citations omitted, 667 F.2d at 703 and 646 F.2d at 1170).

The current state of confusion as to whether substantive due process applies in this area and what this Court meant by Horowitz demand that this Court clarify the law. In the case at bar, the trial court may have erroneously applied a standard of judicial nonintervention in academic affairs, overlooking the substantive due process issue. This case is, therefore, appropriate for a writ of certiorari.

Although the Horowitz, supra decision states that no formal hearing

is required in academic dismissals, two cases have recognized the need for some minimal opportunity to respond to written documents in the student's file. In Hall v. University of Minnesota, 530 F.Supp. 104 (D. Minn. 1982), wherein a student's denial of admission was based on an internal memo from the dean containing uncorroborated allegations which the student had no opportunity to rebut, and in Greenhill v. Bailey, 519 F.2d 5 (8th Cir. 1975), wherein the dismissal of a student was accompanied by a notice that the student lacked intellectual ability which was part of the student's records, the courts required a due process hearing to allow the student to respond to stigmatizing documents in his student file which might be available to other schools or

prospective employers. In the case at bar, the program director's letter to the dean informing that the faculty reevaluation was to dismiss Petitioner based on his academic insufficiencies in failing the new exams contained the spurious and uncorroborated statement that Petitioner was dangerous and lacked integrity. Petitioner was not even provided a copy of that letter until litigation commenced. Some due process procedure must exist to protect students from conduct which can interfere with future admissions or employment without their knowledge or opportunity to respond. This relates to substantive due process since in the case at bar, the post grievance letter may have been motivated by malice or bad faith to punish Petitioner for using the grievance procedure,

conduct which might chill the free exercise of procedural due process. Again, this case is appropriate for a writ of certiorari to clarify the rights of students.

2. When the plaintiff presents several affidavits, depositions and exhibits in response to defendant's motion for summary judgment which raise a genuine issue of material fact as to whether the defendant-university acted arbitrarily, capriciously or in bad faith in dismissing plaintiff-student, does the trial court violate plaintiff's right to due process by granting summary judgment on the ground of judicial nonintervention into academic affairs?

Rule 56 of the Ohio Rules of Civil Procedure sets forth the criteria for granting summary judgment and is similar in nature to that provision of the Federal Rules of Civil Procedure Williams v. Church, 37 Ohio St. 2d 150, 309 N.E.2d 924 (1974). The rule permits summary judgment if the

pleadings, depositions, affidavits and transcripts of evidence show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law provided that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion is made, such party being entitled to have the evidence construed most strongly in his favor. (Rule 56(C) , Appendix D). This Court has held that summary judgment shall not be used where the evidence presents triable issues, where inferences might permit a contrary finding, or where an issue in the litigation is motive or intent which is more appropriately considered at trial where the trier of fact can ascertain the credibility of witnesses.

Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464 (1962); United States v. Diebold, Incorporated, 369 U.S. 654 (1962); and Sartor v. Arkansas Natural Gas Corporation, 321 U.S. 620 (1944). Due process requires that persons forced to settle their claims through the judicial process be given a meaningful opportunity to be heard. Boddie v. Connecticut, 401 U.S. 371 (1971).

In the case at bar, the issue is whether Respondent violated Petitioner's right to substantive due process by dismissing him from the university with conduct that was arbitrary, capricious, or in bad faith. Petitioner presented affidavits and other evidence to show that after the grievance procedure he was administered new exams in conditions different than other students; his exams were graded differently and

on a different curve; he was refused the opportunity to retake the exams or repeat the courses as had been offered other students; he was excluded from a reevaluation meeting where the same faculty that had been found to have acted wrongfully in dismissing him earlier was deciding his future in the program; after being dismissed, a letter accusing him of being dangeorus and lacking integrity was placed in his student file; and he was dismissed from the program while his cumulative grade average even after receiving the failed grade was higher than 37 percent of the class, all of whom graduated, and in spite of the fact that he had passed the failed course in aother college.

It is a mystery that the trial judge in the face of this evidence could

not find any inference or bad motive or intent suggesting an issue of fact regarding whether Respondent acted arbitrarily or capriciously in dismissing Petitioner.

Notwithstanding these factual issues, the trial judge found that Respondent was entitled to judgment as a matter of law because the trial judge erroneously believed the law was judicial nonintervention in academic affiars; substantive due process was dicta, rarely enforced, and not applicable to the case at bar. When the trial judge failed to recognize the numerous factual issues raised by Petitioner's evidence and applied the wrong law to grant summary judgment for Respondent, he denied Petitioner a meaningful opportunity to be heard. Such denial was a denial of Petitioner's

Constitutional right to due process. A violation of Petitioner's Constitutional rights requires the granting of the writ of certiorari to correct this wrong.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that a writ of certiorari be granted to review the judgment of the Supreme Court of Ohio.

Respectfully Submitted,

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APPENDIX A

ORDER OF THE SUPREME COURT OF OHIO OVERRULING MOTION FOR CERT

THE SUPREME COURT OF OHIO

COLUMBUS

Michael Collins, Appellant	:	1984 TERM
	:	To wit: September 19, 1984
v.	:	
	:	Case No. 84-1228
University of Cincinnati, et al., Appellee	:	MOTION FOR AN ORDER DIRECTING THE COURT OF APPEALS
	:	for Hamilton County
	:	to CERTIFY ITS RECORD

It is ordered by the Court that this motion is overruled.

COSTS:

Motion Fee, $20.00, paid by Charles Kamine.

Frank D. Celebrezze
Chief Justice

I, James Wm. Kelly, Clerk of the Supreme Court of Ohio, do hereby certify

that the foregoing order was correctly copied from the records of said Court, to wit, from the Journal of this Court.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of said Supreme Court, this date OCT 02 1984.

JAMES WM. KELLY,
Clerk

JOSEPH N. ROSENTHAL,
Deputy

APPENDIX B

MEMORANDUM DECISION AND JUDGMENT ENTRY OF FIRST DISTRICT COURT OF APPEALS FOR THE STATE OF OHIO

IN THE COURT OF APPEALS

FIRST APPELLATE DISTRICT OF OHIO

HAMILTON COUNTY, OHIO

MICHAEL COLLINS, Plaintiff-Appellant	APPEAL NO. C-830600 TRIAL NO. A-7903992
vs.	MEMORANDUM DECISION AND JUDGMENT ENTRY
THE UNIVERSITY OF CINCINNATI and RAYMOND WALTERS COLLEGE, Defendants-Appellees-Third Party Plaintiffs,	
vs.	
THE CITY OF CINCINNATI, Third-Party Defendant-Appellee	

Mr. Charles S. Kamine, 600 Gwynne Building, 602 Main Street, Cincinnati, Ohio 45202, for Plaintiff-Appellant,

Mr. Sidney Weil and Ms. Janice E. Yates, Suite 1714, 105 East Fourth Street, Cincinnati, Ohio 45202, for the University of Cincinnati and Raymond Walters College, Defendants-Appellees, Third-Party Plaintiffs,

Messrs. Richard A. Castellini and William M. Gustavson, City Hall, Room 214, 801 Plum Street, Cincinnati, Ohio 45202, for City of Cincinnati, Third Party Defendant and Appellee.

PER CURIAM.

This cause came on to be heard upon the accelerated calendar pursuant to App. R. 11.1 and Local Rule 12, the record from the trial court, the briefs and the oral arguments of counsel.

The single assignment of error contends that the trial court erred in granting defendants' motion for summary judgment (which in turn caused the dismissal of defendants' third party complaint). Plaintiff contends that the

affidavits, depositions, and other documentary evidence disclose genuine issues of material fact. Upon review of the entire record presented to us, we hold that while it discloses a dispute between plaintiff as a student in the program of Hospital Pharmacy Technology and the faculty who dismissed him from that program for academic reasons (particularly the faculty member who flunked him in two courses), the record fails to disclose factual issues material to his claim of deprivation of due process. He was afforded full procedural due process. Board of Curators of the University of Missouri (1978), 435 U.S. 78, 98 S. Ct. 948. He was also afforded substantive due process, whatever standard is used to review an academic decision; that is, whether

we use "clearly arbitrary and capricious" (Board of Curators of the University of Missouri, supra; Maitland v. Wayne State University Medical School [1977], 76 Mich. App. 631, 257 N.W.2d 195; Connelly v. University of Vermont and State Agricultural College [D. Vt. 1965], 244 F. Supp. 156), or "bad faith or malice," (Abbariao v. Hamline University School of Law [Minn. 1977], 258 N.W.2d 108; Depperman v. University of Kentucky [E.D. Ky. 1974], 371 F. Supp. 73; Connelly, supra), or "clear abuse of discretion." Schoppelrei v. Franklin University (10th Dist. 1967), 11 Ohio App. 2d 60, 228 N.E.2d 334.

The judgment of the trial court is affirmed. It is further Ordered that a mandate be sent to the Court of Common Pleas of Hamilton County, Ohio, for execution upon this judgment.

Costs to be taxed in compliance with App. R. 24.

And the Court being of the opinion that there were reasonable grounds for this appeal, allows no penalty.

It is further Ordered that a certified copy of this Memorandum Decision and Judgment shall constitute the mandate pursuant to App. R. 27.

To all of which the appellant, by his counsel, excepts.

SHANNON, P. J., BLACK and DOAN, JJ.

APPENDIX C

ENTRY GRANTING SUMMARY JUDGMENT AND MEMORANDUM OF DECISION

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

MICHAEL COLLINS,	:	
Plaintiff	:	CASE NO. A-7903992
vs.	:	(Judge Donald Schott)
UNIVERSITY OF CINCINNATI	:	
and	:	ENTRY GRANTING SUMMARY JUDGMENT
RAYMOND WALTERS COLLEGE	:	
Defendants and Third-Party Plaintiff,	:	
vs.	:	
CITY OF CINCINNATI,	:	
Third-Party Defendant.	:	

This matter came to be heard upon

the Motion of the Defendants University of Cincinnati and Raymond Walters College for Summary Judgment. After full consideration of the pleadings, the depositions and other evidence filed, and the Memoranda and arguments of counsel, the Court finds that there is no genuine issue existing as to any material facts and the University of Cincinnati and Raymond Walters College are entitled to Summary Judgment as a matter of law.

WHEREFORE, IT IS ORDERED, that Summary Judgment be, and hereby is, entered in favor of Defendants University of Cincinnati and Raymond Walters College at Plaintiff's costs. The Third-Party Complaint heretofore filed by the University of Cincinnati against Third-Party Defendant City of Cincinnati is dismissed.

Judge, Court of Common Pleas

COURT OF COMMON PLEAS

HAMILTON COUNTY, OHIO

MICHAEL COLLINS,	:	
Plaintiff	:	NO. A-7903992
vs.	:	
UNIVERSITY OF CINCINNATI, ET AL	:	MEMORANDUM OF DECISION
vs.	:	
CITY OF CINCINNATI	:	

STATEMENT OF THE CASE

In 1975, the Plaintiff Michael Collins was a student in the Hospital Pharmacy Technology program at the Raymond Walters College. Because of his frequent absenteeism, one of his professors "withdrew" him from the 2 required courses the professor taught, giving Collins an "F" in each course and "withdrew" him from the HPT program.

Pursuant to rights granted students by university regulations, Collins filed a grievance against the professor. The Grievance Committee decided he should be given the opportunity either to take final exams in the two referenced courses to be graded by other faculty members, or to withdraw and retake the courses. He chose to take the exams and failed both of them; by a unanimous vote of the HPT faculty he was dismissed from the program. Collins now claims that this action constituted a breach of contract on the part of the university.

Collins had similar problems with absenteeism at the College of Pharmacy prior to his enrollment at Raymond Walters College; he also failed to graduate from the General Studies program at Raymond Walters College

because he refused to make up a three credit hour course. Prior to his enrollment at Raymond Walters College, Collins had similar problems with an instructor at the university's evening college, as a result of which he instituted litigation since dismissed. Defendant, University of Cincinnati, is now asking this Court to grant their motion for summary judgment pursuant to Rule 56.

CONCLUSION

When a student is dismissed for academic reasons a formal hearing is not required to satisfy due process. Michael Collins was afforded a formal hearing through the grievance process, which he actively participated in. Therefore, Raymond Walters did not deny Michael Collins of due process.

For the past 60 years, Courts have

consistently upheld judicial noninterference in academic affairs. Neither does this action fall under the arbitrary and capricious exception to warrant this Court to interfere in academic affairs. An exception which has been recognized primarily in dicta and rarely used.

Any action by this Court would constitute an unwarranted, as well as unprecedented judicial intrusion into matters of traditional educational decision making beyond the scope of judicial review. There is no genuine issue existing as to any material fact, the University of Cincinnati's motion for summary judgment pursuant to Rule 56 of the Ohio Rules of Civil Procedure is granted as a matter of law.

ISSUES PRESENTED

I. Whether Plaintiff, Michael Collins, was denied due process of law under

the fourteenth amendment of the United States Constitution.

II. Whether this Court has the power to interfere with academic matters.

III. Whether Defendant, University of Cincinnati breached its contract with Michael Collins.

IV. Whether Defendant, University of Cincinnati should be granted their motion for summary judgment pursuant to Rule 56 of the Ohio Rules of Civil Procedure.

DISCUSSION

Courts have distinguished between academic dismissals and ones based on misconduct; holding that after a student is dismissed for failing grades, a hearing would serve no purpose. The Supreme Court in Board of Curators v.

Horowitz, 435 U.S. 78 (1978) stated that considering all relevant factors, including the evaluative nature of inquiry and the significant and historically supported interest of the school in preserving its present frame work for academic evaluations, a hearing was not required by the due process clause of the fourteenth amendment.

Goss v. Lopez, 419 U.S. 565 (1975) set forth the due process requirements needed when suspending a student.

> "that the student be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story." Id. at 581.

Goss does not require a formal hearing, all that is required is an "informal give and take" between the

student and the administrative body dismissing him that would, at least, give the student the opportunity to characterize his conduct and put it in what he deems the proper context. Id. at 584. Michael Collins was given written notice, and went through the entire grievance process, thus the University of Cincinnati gave him the procedural due process required by Goss. Since Collins was dismissed for failing grades the University of Cincinnati was not required to give Collins a hearing; the University went beyond what was necessary and gave Collins a formal hearing through their grievance procedures. Collins only alleges that he was denied due process and does not present anything refuting the presumption that standard procedures reviewing academic achievement were

applied. Mere allegations are not enough to establish that Collins was deprived of due process.

Student challenges of low grades and dismissals from undergraduate or graduate programs are extremely common. Most courts which have examined these allegations on their merits have usually upheld the University's actions, especially where a grievance process or administrative review was available to the student. See Patti Ann H. v. New York Medical College, 453 N.Y.S.2d 196 (App. 1982) and Enns v. Board of Regents, No. 99384-3-I (Wash. App. August 12, 1982). In Attia v. Keller, No. 81-3134 (1982) the Sixth Circuit Court of Appeals held that due process requirements were satisfied where a student at Ohio State University was given two conferences with department officials about low

grades as a result of absenteeism. Because Collins was given written notice and went through the entire grievance process the University met the due process requirements under Goss and Attia. Therefore, there has been no denial of the process under the fourteenth amendment.

For the past 60 years courts have consistently upheld judicial noninterference in academic affairs. There is an exception for arbitrary and capricious behavior where courts will interfere although that has been recognized primarily in dicta and even when recognized rarely used.

The Ohio Courts have also followed this rule.

The Court in Schoppelrei v. Franklin University, 11 Ohio App.2d 60 (1907), explained the limited

judicial role in academic evaluation of students. The evaluation of a student's performance was to be made by the institution:

> ". .Compliance with scholastic standards and disciplining requirements are enforced within a broad range of discretion. It seems equally well established that courts will not interfere in these matters in the absence of a clear abuse of discretion by the governing board."

In West v. Board of Trustees of Miami University, 41 Ohio App. 67 (1981) a student who was dismissed for failing to maintain a sufficient grade point sought to enjoin the university from carrying out the suspension. The Court of Appeals overruled the trial court's granting of an injunction, saying that the legislature had placed authority with the university to adopt Rules and Regulations for proper academic instruc-

tion. The Court refused to interfere with the faculty's decision, in the absence of allegations that the Rules and Regulations themselves were unreasonable.

> "It is clear that the faculty consisting of the teaching body of the institution, must be the tribunal, under the discretion and controlling jurisdiction of the trustees, to pass upon the fitness of the students to continue their study of the courses selected or required." Id. at 384.

In Mahavongsanan v. Hall, 529 F.2d 448 (1976) the Court held that:

> "[W]e know of no case which holds that colleges and universities are subject to the supervision or review of the courts in the uniform application of their academic standards."

In Board of Curators v. Horowitz, 435 U.S. 78 (1978) the Supreme Court

stated:

> "Like the decision of an individual professor as to the proper grade for a student in his course, the determination whether to dismiss a student for academic reasons requires an expert evaluation of cumulative information and is not readily adaptable to the procedural tools of judicial or administration decision-making . . . courts are particularly all-equipped to evaluate academic performance."

The New York Court of Appeals refused to require a college to grant a degree to a master's program candidate after he failed his final comprehensive exam, due to a misunderstanding of the instructors and then refusing to retake the exam. The Court said:

> "In order for a society to be able to have complete confidence in the credentials dispensed by academic institutions, however, it is essential that the decisions surrounding the issuance of these credentials

> be left to the sound judgment of the professional educators who monitor the progress of their students on a regular basis." Olsson v. Board of Higher Education, 49 N.Y.2d 408 (1980).

The determination of a professor whether to dismiss a student for academic reasons requires expert evaluation not readily available to judicial decision making. Any hearing by the Court would be useless and harmful in finding out the truth as to scholarship Barnard v. Shelburne, 102 N.E. at 1097 (1913).

Courts may review actions of the school if the authorities acted in an arbitrary and capricious manner. See Lapolla v. University of Akron, No. 7464 (Ct. App. Summit Co.; 1974).

Michael Collins alleges that he was treated in an arbitrary and capricious manner by the faculty members at Raymond Walters College; he received his remedy

through the University's normal three-step grievance procedures, which he actively participated in. Collins has shown no specific instance to support a decision that his failure to graduate was for any other than his own academic short comings.

In McDonald v. Hogness, 598 P.2d 707 (1979) cert. denied 100 S. Ct. 1650 (1980), the Washington Supreme Court defined and stated:

> " . . . Action is not arbitrary or capricious when exercised honestly and upon due consideration even though it may be believed that an erroneous conclusion has been reached." (Quoting Dupont Ft. Neurs School, District No. 7 v. Bruno, 489 P.2d 171, 174 (1971).

Just because Michael Collins feels the Grievance Committee came up with an erroneous decision does not mean the

Committee acted in an arbitrary and capricious manner towards him. See Patti Ann H. v. New York Medical College, 453 N.Y.S.2d 196 (App. Div. 1982). Therefore, this Court can not find as a matter of law that the University's decision was made in bad faith and not supportable on a rational basis against Michael Collins.

Michael Collins alleges that he has a constractual relationship with the University of Cincinnati, an issue usually addressed by courts in dicta, if at all. If such a contract existed the University's only obligations were to treat Michael Collins fairly. Foblitz v. Western Reserve University, 21 Ohio C.C. 144 (1901). Tedeschi v. Wagner College, 404 N.E.2d 1302 (1980).

It should be noted that in the recent case of Neel v. Indiana

University Board of Trustees, 435 N.E.2d 607 (Ct. App. 1982), a student dismissed for unsatisfactory grades and deficiency in clinical achievement alleged the University breached its contract for dismissing him without first giving him a detailed explanation of the school's absence policy. The Court held that the student could have reasonably expected to be dismissed based upon his dismal record, warnings of faculty and excessive absences. It found neither a breach of contract nor a due process violation in the student's dismissal. Michael Collins is similarly situated with the plaintiff in Neel with one exception Collins received a formal hearing through the University Grievance Committee. Michael Collins was treated more than fairly because academic dismissals do not require formal hearings. Therefore,

the University of Cincinnati did not breach its contract with Michael Collins.

We are dealing with a matter of purely academic perogatives, any action by this Court would constitute an unwarranted as well as unprecedented judicial intrusion into matters of traditional educational decision making which are beyond the scope of judicial review. There is no genuine issue existing as to any material fact, the University of Cincinnati's motion for summary judgment pursuant to Rule 56 of the Ohio Rules of Civil Procedure is granted as a matter of law.

APPENDIX D

CIVIL RULE 56(A), (B), (C), (D), (E), (F), (G), OHIO RULES OF CIVIL PROCEDURE

RULE 56. Summary Judgment

(A) For party seeking affirmative relief. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of the time permitted under these rules for a responsive motion or pleading by the adverse party, or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof. If the action has been set for pretrial or trial, a motion for summary judgment may be made only with leave of court.

(B) For defending party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof. If the action has been set for pretrial or trial, a motion for summary judgment may be made only with leave of court.

(C) Motion and proceedings thereon.

The motion shall be served at least fourteen days before the time fixed for hearing. The adverse party prior to the day of hearing may serve and file opposing affidavits. Summary judgment shall be rendered forthwith if the pleading, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from such evidence or stipulation and only therefrom, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, such party being entitled to have the evidence or stipulation construed most strongly in his favor. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(D) Case not fully adjudicated upon motion. If on motion under this rule summary judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary,

the court in deciding the motion, shall examine the evidence or stipulation properly before it, and shall if practicable, ascertain what material facts exist without controversy and what material facts are actually and in good faith controverted. The court shall thereupon make an order on its journal specifying the facts that are without controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(E) Form of affidavits; further testimony; defense required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavit or as

otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(F) When affidavits unavailable. Should it appear from the affidavits of a party opposing the motion for summary judgment that he cannot for sufficient reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or discovery to be had or may make such other order as is just.

(G) Affidavits made in bad faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

(2)

No. 84-957

FILED
JAN 14 1985
ALEXANDER L. STEVAS, CLERK

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

MICHAEL COLLINS,

Petitioner,

vs.

THE UNIVERSITY OF CINCINNATI and RAYMOND WALTERS COLLEGE,

Respondents,

vs.

THE CITY OF CINCINNATI,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

When extensive depositions produce no material facts showing abuse of discretion, arbitrary and capricious conduct, is summary judgment properly granted to a university which dismissed a student for academic reasons?

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RESPONDENT'S BRIEF IN OPPOSITION

OPINIONS BELOW

The Supreme Court of Ohio denied without opinion petitioner's motion to certify the record from the First District Court of Appeals. (Petitioner's Appendix A)

The Ohio First District Court of Appeals issued a memorandum decision (unreported) and judgment entry affirming the trial court decision. (Petitioner's Appendix B)

The Common Pleas Court of Hamilton County, Ohio issued an entry granting summary judgment and memorandum of decision. (Also unreported) (Petitioner's Appendix C)

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

CONSTITUTION PROVISIONS, STATUTES AND REGULATIONS

The constitutional provisions are adequately set forth in the petition and Petitioner's Appendix D.

STATEMENT OF THE CASE

Petitioner Michael Collins skipped classes in a professional pharmacology program at the University of Cincinnati and was expelled. He took full advantage of the University's established grievance procedure, and, as a result, was given the opportunity to retake two final examinations and a second chance for reinstatement in the program. He failed the make-up exams and was not reinstated, so he sued the University claiming it had the contractual duty to give him a degree.

Extensive depositions failed to produce any evidence supporting his original claim of breach of contract, and his allegations of arbitrariness, capriciousness and failure of due process all of which were raised before the trial court. The University was granted summary judgment, which the Court of Appeals affirmed and the Ohio Supreme Court refused to review.

Petitioner Collins, in short, has had every opportunity to produce *evidence* supporting his claims, and failed to do so. There being no *material* facts in dispute, the action of the lower courts was not only proper, but required.

Collins' academic problems originated more than nine years ago. In the summer of 1975, he transferred to a two year hospital pharmacy technology (H.P.T.) program at the University of Cincinnati's Raymond Walters College. He had been suspended from a related four year program in the College of Pharmacy for twice failing a required course.

However, once admitted to the program, Collins continued his chronic pattern of extended, unexplained absences from classes and his scholastic performance again deteriorated. At the end of the fall quarter, one of his professors withdrew Collins from his two classes with grades of "F" and the faculty voted to expel him from the program on academic grounds.

Collins thereupon took advantage of the University's grievance procedure. In January, 1976, he filed a single grievance which covered five complaints — two summer grades, his withdrawal from two fall classes with "F's" and his expulsion from the H.P.T. program. Following the procedures spelled out in detail in each student handbook, an Ad Hoc committee of five faculty members from outside the department and two students was selected, in part, by Collins. The committee questioned faculty and student witnesses for two days. The roster included Collins (who testified both days), the professor who was the subject of the grievance and seven students including three students Collins selected from his sixteen classmates. In addition, the committee interviewed five of Collins' other instructors, including one who taught him earlier in the College of Pharmacy, and his advisor. Collins was present for the hearings, questioned several witnesses himself, and submitted two notebooks of supplemental material he considered relevant to his grievance.

The grievance committee gave Collins partial relief; it raised two grades and since other students had been permitted to retake exams, it gave Collins the *choice* of retaking two final exams, prepared and graded by three faculty members other than the professor Collins considered objectionable, or receiving a "W" (withdrawal with no grade).

Collins chose to take make-up exams in both courses. He had a month to prepare. On one exam he answered two questions correctly out of twenty-one; his final grade was "F". On the second exam, he scored 53½% on a scale of 100%, his exam grade was "F," but his final grade was raised to a "C" after a lab grade was included. After the make-up exam results were known, the H.P.T. faculty voted on Collins' reinstatement, pursuant to the decision of the grievance committee. Each voting member had had Collins as a student in at least one class and the vote was unanimous against reinstatement.

In May, 1979, Collins sued the University for breach of an implied contract to give him a degree. The trial court granted the University's motion for summary judgment after it had the opportunity to examine the depositions of Collins' teachers and University administrators, University records, affidavits from Collins' expert witness and his former classmates. The court held that Collins had not put in dispute any *material fact* that involved alleged arbitrary and capricious conduct. Absent that, the court held it would not substitute its judgment for that of the University faculty. (Petitioner's Appendix A)

The appeals court unanimously affirmed the trial court, holding that Collins received full procedural and substantive due process, no matter what standard is used to review an academic decision, whether it be "clearly arbi-

tary and capricious" (*Board of Curators of the University of Missouri* v. *Horowitz,* 435 U.S. 78, 98 S.Ct. 948 (1978)) or "bad faith or malice" (*Connelly* v. *University of Vermont and State Agricultural College,* 244 F. Supp. 156 (D. Vt. 1965)) or "clear abuse of discretion" (*Schoppelrei* v. *Franklin University,* 11 Ohio App. 2d 60, 228 N.E. 2d 334 (10th Dist. 1967)) (Petitioner's Appendix B) The Ohio Supreme Court overruled Collins' motion to certify. (Petitioner's Appendix C)

SUMMARY OF ARGUMENT

This case raises no novel questions of law. Summary judgment was properly granted against Petitioner Collins because his extensive discovery failed to disclose factual issues material to his claim of deprivation of due process, no matter whether the standard is "clearly arbitrary and capricious" (*Horowitz,* supra.) or "clear abuse of discretion" (*Schoppelrei,* supra.).

ARGUMENT

There is absolutely no evidence in this case of arbitrary and capricious treatment. Without support in the record, Petitioner's asserted "Questions of Law" contain a series of argumentative conclusions from which Collins labels the University's grievance procedure as a "sham". Yet, he did not complain about the portions which raised two of his grades; he did not object to being given a choice of retaking two additional exams or having his original grades of "F" expunged. He complains now solely because after he failed the make-up exams, the faculty refused to reinstate him.

When any student is expelled for academic reasons, two

questions are involved. First, was the student, in fact, academically deficient – a question which is beyond judicial review. Second, were school authorities motivated by malice, or did they act arbitrarily and capriciously. *Connelly* v. *University of Vermont and State Agricultural College,* 244 F.Supp. 156, 159 (D. Vt. 1965). Courts do not interfere otherwise. *Mahavongsanan* v. *Hall,* 529 F.2d 448 (5th Cir. 1976).

Collins is repeating the litany of countless students who failed to meet academic standards. In *Connelly,* a third-year medical student complained that he was arbitrarily failed in a pediatrics- obstetrics course when his work was of passing quality. The District Court stated "whether the plaintiff should or should not have received a passing grade . . . is a matter wholly within the jurisdiction of the school authorities, who alone are qualified to make such a determination." *Connelly,* 244 F.Supp. at 161. Such is the case with Collins' make-up exams.

In *Nuttelman* v. *Case Western Reserve University,* 560 F.Supp. 1 (N.D. Ohio 1981) (motion for summary judgment granted), *aff'd. mem.* — F.2d — (6th Cir. 1981), a graduate nursing student accused faculty members of prejudice, using an "unfair" grading curve and evaluation procedures. The District Court wrote "all of these claims are without merit . . . Plaintiff has made no showing that the actions of the defendants in this case were in any way arbitrary or capricious." *Id.* pp. 2 3, citing to *Gaspar* v. *Bruton,* 513 F. 2d 842 (10th Cir. 1975). (The *Gaspar* plaintiff blamed "personality conflicts" with faculty members as the reason for her dismissal; University's motion for summary judgment granted and affirmed.)

Collins further states that, because he was not rein-

stated, improprieties existed in the grievance committee's remedy. The H.P.T. faculty's vote was not arbitrary and capricious *merely* because the teachers refused to reinstate him because a determination of satisfactory work is not based on a specific percentage grade but on an appraisal of a student's record and potential. ***Balogun*** v. *Cornell University,* 70 Misc. 2d 474, 333 N.Y. 2d 838 (S.Ct. Madison Cty. 1971) (again, motion for summary judgment granted). The consensus of faculty opinion, no matter how unflattering to Collins, simply does not create a conspiracy nor does it suggest arbitrary and capricious behavior. *Woodruff* v. *Georgia State University,* 304 S.E. 2d 697 (Ga. 1983) (motion for summary judgment granted and affirmed). The letter which Collins complains stigmatizes him played no part in the faculty's vote not to reinstate him — the letter was written after he failed both make-up exams and the faculty voted. The University never publicized either the exam results, the faculty vote or any other information about Collins' failure to graduate and there is no allegation that it did.

Any academic evaluation of a student is, by its nature, subjective and requires "an expert evaluation of cumulative information and is not readily adapted to the procedural tools of judicial or administrative decision making." *Board of Curators of University of Missouri* v. *Horowitz,* 435 U.S. at 90, 98 S.Ct. at 955. Although the substance of that case dealt with procedural due process, this Court rejected the student Horowitz's argument that a substantive due process violation also existed. Horowitz's allegations of sex discrimination, being dismissed for tardiness, absences and lack of personal hygiene failed to make even a *showing* of arbitrariness or capriciousness.

The faculty vote against reinstating Collins was not

arbitrary or capricious, even though he alleges another marginal student was allowed to repeat the academic year. *Patti Ann H.* v. *New York Medical College,* 453 N.Y.S. 2d 196 (Sup. Ct. App. Div. 1982). The College's decision not to reinstate a marginal student ". . . did not demonstrate bad faith, arbitrariness or irrationality. It was based on a proper and legitimate, though subjective, judgment rendered within a professional and academic milieu."

Collins repeatedly attempts to blur the distinction between academic and disciplinary dismissals. The latter include misconduct, aggressive or disruptive behavior, immorality, even student demonstrations. Dismissals for student misconduct require "an informal give and take" between the student and the administration to determine if the offending conduct took place. The student is entitled to put his conduct in the proper context. *Goss* v. *Lopez,* 419 U.S. 565, 584, 95 S.Ct. 719, (1975); *Gaspar* v. *Bruton,* supra.

Academic dismissals, on the other hand, *do not require a hearing,* not even the informal "give and take" of *Goss. Board of Curators of University of Missouri* v. *Horowitz,* 435 U.S. at 87, 98 S.Ct. at 953. In any case, Collins received more due process than even *Goss* requires, when he used the grievance procedure. Due process did not entitle him to a second grievance hearing to challenge the second faculty vote. *Neel* v. *Indiana University Board of Trustees,* 435 N.E. 2d 607 (Ind. App. 1982). A dental school faculty did not act arbitrarily and capriciously when it voted twice to dismiss a graduate student for excessive absences and poor clinical performance, the second vote following the student's appeal of the first dismissal. The court wrote that the student could reasonably have

expected to be dismissed for his excessive absences, the faculty warnings and dismal academic record. The student's due process rights were satisfied by the conferences following his first dismissal; he was not entitled to additional hearings after the second faculty vote. See also *Hines* v. *Rinker,* 661 F. 2d 699 (8th Cir. 1981)

After examining all Collins' allegations including arbitrary and capricious conduct, the trial court held that Collins put no *material* facts in dispute. He had no evidence to show that his dismissal from the H.P.T. program was for reasons other than his own academic shortcomings. (Petitioner's Appendix C, pp. 50-52) In his petition, Collins again sidesteps that issue, citing decisions on motions to dismiss as if those cases involved the same standard of review as did the resolution of this case on motion for summary judgment. In *Shuffer* v. *Board of Trustees of California State University and College,* 67 Cal. App. 3d 208, 163 Cal. Rptr. 527 (1977), the issue arose in a motion to dismiss and further, unlike Collins, the student was a straight "A" student whose academic qualifications were never in doubt. Similarly, in *Depperman* v. *University of Kentucky,* 371 F.Supp. 73 (E.D. Ky. 1974); *Maitland* v. *Wayne State University Medical School,* 76 Mich. App. 631, 257 N.W. 3d 195 (1977); and *Abbariao* v. *Hamline University School of Law,* 258 N.W. 2d 108 (Minn. 1977), and *Connelly, supra,* at issue was either a motion to dismiss or an action applying the same standard of review. Interestingly in *Abbariao,* the court reversed a motion to dismiss, on grounds the student should have had access to a grievance procedure, a right which Collins had and exercised. But as to his academic qualifications, the court wrote "An adjudicative hearing will not determine whether a student's educational performance was satisfactory. That issue would be

resolved only by regarding the student's examinations, which is a professor's and not a judge's function."

The procedural irregularities of which Collins complained prior to the second faculty vote were remedied by the grievance procedure. The faculty's ultimate decision that Collins was not academically qualified to remain in the H.P.T. program is not a due process issue but an academic decision outside the expertise of the courts and, based on *Board of Curators* v. *Horowitz, Woodruff, Neel, Nuttelman,* etc., not subject to further administrative appeals.

CONCLUSION

Petitioner Collins has repackaged his original breach of contract claim as a breach of due process to address a federal question which does not exist. The petition for writ of certiorari should be denied.

Respectfully submitted,

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